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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950

No. 294

JOSEPH AND BULA R. CARMACK,
*Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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By:
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San Antonio, Texas
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AMERICAN PRINTERS, NO. 2

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950

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**No.————**

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JOSEPH AND BULA R. CARMACK,
*Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

# Supreme Court of the United States

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**No.————**

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JOSEPH AND BULA R. CARMACK,
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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled cause on June 30, 1950, as modified by order entered on August 1, 1950, affirming the judgment of the Tax Court entered on August 23, 1949.

## OPINIONS BELOW

The opinion of the Tax Court (R. 21-25) is not reported. The opinion of the Circuit Court of Appeals (R. 103-106) is reported in_____F. (2d)_____.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 30, 1950, (R. 107) and modified on August 1, 1950 (R. 113). The jurisdiction of this Court is invoked under Section 1254 (1), Title 28, United States Code, Judiciary and Judicial Procedure, and under Supreme Court Rule No. 38, Sec. 5.

## QUESTIONS PRESENTED

The controlling questions presented in this petition are:

1. Did the Tax Court err as a matter of law in disregarding the uncontradicted testimony of petitioners regarding property owned by them at the beginning and end of the taxable year?

2. Did the Tax Court err by including a portion of taxable army pay in taxable net income twice?

3. Did the Tax Court err in refusing to eliminate nontaxable income from increase in net worth?

4. Did the Fifth Circuit err in refusing to remand to the Tax Court for correction of an admitted mistake in addition made by the Tax Court?

## STATUTES, REGULATIONS AND RULES INVOLVED

The statutes, regulations and rules involved are set forth in the Appendix, infra, pp 7-9.

## STATEMENT OF FACTS

The facts, as proved upon trial before the Tax Court, (R. 9, 15-21, 33-35, 42-48, 57, 63, 77, 107, 110-111, 113) may be summarized as follows:

Petitioners are husband and wife and reside in San Antonio, Texas, (R. 15).

The husband was a career man in the United States Army, enlisting as a private in 1923 and becoming a colonel in 1945, (R. 16, 17). He was retired as a colonel on December 31, 1946, (R. 42).

The husband went overseas in July of 1943 (R. 46) and returned to the United States in November of 1945 (R. 57).

After the husband's return to the United States, he and his wife filed joint income tax returns for the years 1943, 1944 and 1945 (R. 15, 42). The only income reported in these returns was taxable army pay (R. 15).

Petitioners' 1945 and 1946 returns were assigned to a deputy collector of internal revenue for routine investigation. The 1945 return was assigned to the deputy collector about July of 1947 (R. 77), and the 1946 return came later (R. 77).

For many years prior to 1945 the husband played poker (R. 42). Upon being advised by the deputy collector that poker winnings had to be reported, petitioners filed amended returns for the years 1944 and 1945, reporting poker gains of $5,000 for 1944 and estimated gains of $6,500 for 1945 (R. 20, 42).

The husband did not keep a double entry set of books prior to the time that he returned to the United States in 1945 (R. 43). After the deputy collector began his investigation, the husband prepared a double entry set of books for the year 1945 in which he identified all of his cash receipts (R. 43 and Petitioners' Exhibit No. 3). Any disbursement that he could not identify was treated as a living expense (R. 63).

By letter dated March 26, 1948, Frank Scofield,

Collector of Internal Revenue, advised petitioners that their corrected adjusted gross income for the year 1945 was $45,889.54 (R. 9), and that they owed additional tax, penalty and interest for said year of $19,482.10, $974.11 and $2,256.03, respectively (R. 9).

Petitioners appealed to the Tax Court and, upon the hearing, introduced evidence, both oral and written, relating to assets owned by them at the beginning and at the end of the year 1945, and to all receipts and disbursements during said year (R. 44, 45 and Petitioners' Exhibits Nos. 3 and 4). The Tax Court rejected petitioners' evidence as to cash and accounts receivable owned at the beginning of the year, as to accounts receivable owned at the end of the year, and as to the classification of receipts received during the year (R. 15-25). The Tax Court also duplicated $1,669.96 of the husband's taxable army pay in computing taxable net income (R. 110-111).

In computing petitioners' taxable net income based upon its own findings of fact and erroneous idea of computing net income on the net worth basis, the Tax Court made a error of $1,000 against petitioners. This error was admitted by respondent in the Circuit Court of Appeals (R. 111).

The Circuit Court of Appeals originally affirmed the Tax Court's judgment (R. 107). Upon petitioners' motion to modify its decision, the Circuit Court modified by providing that the affirmance is without prejudice to the right of the Tax Court under Rule 50 to make any corrections in its computation of petitioners' tax liability warranted or justified by the record (R. 113).

## REASONS WHY THE WRIT SHOULD BE GRANTED

1. The holding that the Tax Court was not bound to believe or accept the uncontradicted testimony of taxpayer and his wife is in direct conflict with the decision

of the Tenth Circuit in *Crude Oil Corp.* vs. *Commissioner*, 161 F. (2d) 809; the Sixth Circuit in *Mayson Mfg. Co.* v. *Commissioner*, 178 F. (2d) 115; the Ninth Circuit in *Grace Bros.* vs. *Commissioner*, 173 F. (2d) 170; and with the Fifth Circuit's own decisions in *Foran* v. *Commissioner*, 165 F. (2d) 705, and *Howell Turpentine Co.* v. *Commissioner*, 162 F. (2d) 319.

2. The Circuit Court held that the Tax Court computed the unreported gross income of taxpayers by the net worth method of computation. This holding is erroneous. The Tax Court used a hybrid method of computing petitioners' gross income and, in so doing, included $1,669.96 of the husband's taxable army pay in gross income twice.

3. The decision of the Tax Court, as affirmed by the Fifth Circuit, taxes the first $1,500 of army pay in violation of Sec. 22(b), (13) (A), Internal Revenue Code, and taxes rental and subsistence allowances in violation of the Commissioner's own regulations.

4. The Tax Court found as a fact that petitioners' gross income for the year 1945 was $38,465.49. Upon appeal to the Fifth Circuit the respondent admitted that the Tax Court should have found their gross income to be $37,465.49. An error of fact can not be corrected under Rule 50 of the Tax Court, as "Any argument under this rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the report already made."

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Fifth Circuit Court of Appeals commanding that court to certify and send to this Court for its review and determination a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals, Fifth

Circuit, had in the case numbered and entitled on its docket No. 13,075, JOSEPH AND BULA R. CARMACK, PETITIONERS, versus COMMISSIONER OF INTERNAL REVENUE, RESPONDENT, to the end that this case may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment of the Tax Court and of the Circuit Court of Appeals be reversed with appropriate directions by this Court, and for such further relief as to this Court may seem proper.

JOSEPH AND BULA R. CARMACK

By: _____

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*Attorney for Petitioners.*

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San Antonio, Texas
*Of Counsel*

## APPENDIX

*Internal Revenue Code*:

Sec. 22(b). *Exclusions from gross Income.* The following items shall not be included in gross income and shall be exempt from taxation under this chapter.

(13). *Additional allowance for military and naval personnel.* (A) In the case of compensation received prior to January 1, 1949, during any taxable year, for active service as a commissioned officer * * * in the military or naval forces of the United States during the present war, * * * so much of such compensation as does not exceed $1,500.

*Regulations* 111:

Sec. 29.22(a)-3. *Compensation paid other than in cash* * * *. The value of quarters furnished to the commissioned officers * * * of the Army, * * * or amounts received by them as commutation of quarters, are to be excluded from gross income.

*Min.* 3413, *CB June* 1926, *p.* 29:

The Act of June 10, 1922, entitled "An Act to readjust the pay and allowances of the commissioned and enlisted personnel of the Army * * *", provides in section 5 thereof for the payment to officers of money allowances for subsistence and in section 12 for the payment of per diem allowances in lieu of subsistence to officers traveling on official business away from the designated post of duty.

It held that the money allowance for subsistence and the per diem allowance in lieu of subsistence paid to the officers referred to above traveling on official business away from the designated post of duty are allowances and not compensation within the meaning of the laws of Congress imposing an income tax and, therefore, amounts

representing such allowances should not be considered as income subject to Federal income tax.

*Rules of Practice Before the Tax Court of the United States*:

Rule 50.—*COMPUTATIONS BY PARTIES FOR ENTRY OF DECISION*

Where the Court has promulgated or entered its opinion determining the issues in a proceeding, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the Court's determination of the issues, showing the correct amount of the deficiency or overpayment to be entered as the decision. If the parties are in agreement as to the amount of the deficiency or overpayment to be entered as the decision pursuant to the report of the Court, they or either of them shall file promptly with the Court an original and two copies of a computation showing the amount of the deficiency or overpayment and that there is no disagreement that the figures shown are in accordance with the report of the Court. The Court will then enter its decision. If, however, the parties are not in agreement as to the amount of the deficiency or overpayment to be entered as the decision, in accordance with the report of the Court, either of them may file with the Court a computation of the deficiency or overpayment believed by him to be in accordance with the report of the Court. The Clerk will serve a copy thereof upon the opposite party, will place the matter upon a motion calendar for argument in due course, and will serve notice of the argument upon both parties. If the opposite party fails to file objection, accompanied by an alternative computation, at least five days prior to the date of such argument, or any continuance thereof, the Court may enter decision in accordance with the computation already submitted. If in accordance with

this Rule computations are submitted by the parties which differ as to the amount to be entered as the decision of the Court, the parties will be afforded an opportunity to be heard in argument thereon on the date fixed, and the Court will determine the correct deficiency or overpayment and enter its decision.

*Any argument under this Rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the report already made, and no argument will be heard upon or consideration given to the issues or matters already disposed of by such report or of any new issues. This Rule is not to be regarded as affording an opportunity for rehearing or reconsideration.* (Emphasis supplied).

IN THE

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COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### OPINIONS BELOW

The opinion of the Tax Court is not reported. The opinion of the Circuit Court of Appeals is reported in ----------F. (2d) ----------.

### JURISDICTION

This has been stated in the preceding Petition for Writ of Certiorari, page 1, to which reference is here made, and, therefore, will not be repeated here.

### QUESTIONS PRESENTED

The questions presented are set out on page 2 of the preceding Petition for Writ of Certiorari, which are hereby adopted and made a part of this brief.

## STATUTES, REGULATIONS AND RULES INVOLVED

These have been set out in the Appendix to the Petition for Writ of Certiorari, pages 7 to 9, inclusive, to which reference is here made, and, therefore, will not be repeated here.

## STATEMENT OF THE CASE

This has already been stated in the preceding Petition for Writ of Certiorari, on pages 2 to 4, inclusive, which is hereby adopted and made a part of this brief.

## SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that the Tax Court was not bound to believe the uncontradicted testimony of petitioners.

2. The Circuit Court of Appeals erred in holding that the Tax Court computed petitioners' gross income by the net worth method.

3. The Circuit Court of Appeals erred in affirming the Tax Court's action in taxing receipts that are excluded from income by statute, regulations and rulings.

4. The Circuit Court of Appeals erred in refusing to remand this cause to the Tax Court for correction of an admitted mistake made by the Tax Court in computing petitioners' taxable net income.

## ARGUMENT

I.

*The Tax Court can not disregard the sworn testimony of a witness where the testimony is not contradicted and the witness is not impeached.* (Pertinent to Assignment 1 and First Question.)

The husband testified that he gave his wife $7,000 as a wedding present when they were married in 1931, and that thereafter he had made monthly gifts to his wife for a period beginning in 1932 and ending in July of 1943. This testimony was corroborated by the wife. The husband further testified that he had $5,000 in his possession on January 1, 1945, which represented poker winnings during the year 1944, and that $3,300 was owing to him at the same time for money that he had loaned to other army officers.

The wife testified that she had $3,000 in cash at the date of her marriage in 1931, and that she had $20,031.25 in her possession on January 1, 1945.

Neither the testimony of the husband nor the wife was contradicted. Neither witness was impeached. Unless the testimony of the witnesses was highly improbable or manifestly unreasonable, the Tax Court erred in rejecting same. *Crude Oil Corp.* v. *Commissioner*, 161 F. (2d) 809; *Foran* v. *Commissioner*, 165 F. (2d) 705; *Grace Bros.* v. *Commissioner*, 173 F. (2d) 170; *Howell Turpentine Co.* v. *Commissioner*, 162 F. (2d) 319; *Mayson Mfg. Co.* v. *Commissioner*, 178 F. (2d) 115.

The Fifth Circuit cited *O'Laughlin* v. *Helvering*, 81 F. (2d) 269, and *Rand* v. *Helvering*, 77 F. (2d) 450, 451, as authority for its holding that the Tax Court did not have to accept the uncontradicted testimony of petitioners. The cited cases are distinguishable from the instant case on the facts. In the *O'Laughlin case*, the taxpayer claimed that he had used moneys paid him as commissions for Christmas basket funds, labor unions, admission tickets and donations to political organizations, but was unable to name any of the recipients. The Court properly held that his testimony did not have to be accepted. In the *Rand case*, taxpayers sold stock in an insolvent corporation

to an employee at a nominal figure. The stock was reconveyed to the sellers the following year at the same recited consideration. Neither the taxpayers nor the employee testified that the sales were complete and final with no undersanding that the sellers would repurchase. In fact, the testimony inferred that there was an understanding that the taxpayers would repurchase the stock. The Eighth Circuit Court of Appeals held that taxpayers had not met the burden of proof that the sales were complete and final.

In the instant case, petitioners' testimony was direct, positive and uncontradicted. The instant case is on all fours with *Foran* v. *Commissioner*, 165 F. (2d) 705, decided by the Fifth Circuit on January 20, 1948, in which the Court held that the Tax Court's refusal to follow the reasonable and uncontradicted sworn testimony of taxpayer regarding his intent in holding certain oil producing properties for more than 18 months and in thereafter selling the properties was contrary to law, in absence of circumstances inconsistent therewith.

The Fifth Circuit was of the opinion that petitioners' testimony was highly improbable and manifestly unreasonable, but it did not give any reasons for this opinion. Had the witnesses been people of dubious character, or gangsters, or underworld characters, there might be some basis for the opinion; but these witnesses are above suspicion. The husband was commissioned from the ranks during peace time. Unless he had been of good character, he would not have been commissioned from the ranks in time of peace. He served sixteen years as a commissioned officer, being promoted through the grades from second lieutenant to colonel. Therefore, any doubt regarding the correctness of his testimony would have to be grounded on the improbability of the facts rather than on his veracity.

Let us examine the facts, as disclosed by the record.

to see whether the facts to which petitioners testified seem highly improbable or are corroboraed by other parts of the record. In the first place, it is alleged in the petition to the Tax Court that the husband had played poker for high stakes for many years prior to 1945 (R. 5). "High stakes" is a relative term, but it most certainly does not mean "penny ante." Furthermore, the husband won $5,000 in one poker game a short time prior to his marriage (R. 45). He admits having won $5,000 during 1944 and $4,718.75 during 1945. Does it seem highly improbable that an army officer of such talent as a poker player could give his wife $1,200 a year when he was a second lieutenant; $1,800 a year when he was a first lieutenant; and $2,400 a year when he was a captain? Or do the facts corroborate petitioners' testimony?

It is undisputed that the wife purchased an apartment house in January of 1946 for $30,000 and that the $30,000 was paid out of her separate funds and estate. When we consider the fact that the deputy collector began his investigation in July of 1947, does the fact that the wife had $30,000 of separate funds in January of 1946 render improbable her testimony that she had $20,031.25 on January 1, 1945? Or does it corroborate her testimony?

Furthermore, compare petitioners' net worth on December 31, 1945, as disclosed by their Exhibits Nos. 3 and 4, with their net worth as found by the Tax Court:

| | Petitioners' Record | Tax Court's Finding |
|---|---|---|
| Bank Accounts | $ 9,215.01 | $ 9,215.01 |
| Series E Bonds | 13,125.00 | 13,087.50 |
| Postal Savings | 5,000.00 | 5,000.00 |
| Cashier's Checks | 15,000.00 | 15,000.00 |
| Accounts Receivable | 550.00 | |
| Totals | $42,890.01 | $42,302.51 |
| Difference | | 587.50 |
| | | $42,890.01 |
| This difference consists of: | | |
| Series E Bonds | | $ 37.50 |
| Accounts Receivable | | 550.00 |
| | | $ 587.50 |

Since the $37.50 difference in the bond account was also present on January 1, 1945, the transactions recorded during the year in all of petitioners' accounts, except "Accounts Receivable," have been corroborated by the Tax Court's own findings of fact with respect to assets owned by the petitioners at the end of 1945. Having arrived at a correct ending, petitioners' records must have been commenced with a correct premise. Does this refute or corroborate petitioners' testimony?

The husband testified that he had $5,000 cash in his possession on January 1, 1945. The Tax Court held, without any evidence on which to base its holding, that he had no cash in his possesion on January 1, 1945. Yet, according to the Tax Court, he won over $30,000 play-

ing poker during 1945. In order to win this much money in a single year he must have played for high stakes—yet, according to the Tax Court, he had no stake with which to play!

It is respectfully submitted that petitioners' testimony, rather than being highly improbable and manifestly unreasonable, was corroborated by other facts and events, and the Tax Court's refusal to follow the reasonable and uncontradicted sworn testimony of taxpayers was contrary to law, in the absence of circumstances inconsistent therewith. *Foran* v. *Commissioner*, 165 F. (2d) 705.

II.

*The Tax Court's method of computing net income was not the "net worth" method and it erroneously increased petitioners' net income by duplicating* $1,669.96 *of taxable army pay.* (Pertinent to Assignment 2 and Second Question.)

It is elementary that the net worth method of computing net income includes all assets acquired and all income received during the year. The only adjustment to increase in net worth permissible, is the adding of personal expenditures not reflected in such increase. *Kenney* v. *Commissioner*, 111 F. (2d) 374.

The Tax Court duplicated $1,669.96 of the husband's taxable army pay in computing net income (R. 110-111).

It is respectfully submitted that the refusal of the Tax Court and the Fifth Circuit to eliminate this duplication of taxable income is so unreasonable and arbitrary as to be shocking to the conscience of all reasonable persons.

III.

*The Tax Court erred in refusing to eliminate non-*

*taxable receipts.* (Pertinent to Assignment 3 and Third Question.)

Repeating what was said under Subdivision II of this brief, it is elementary that the net worth method of computing net income accounts for all receipts of money and property except receipts that have been disbursed for expenses during the year. Any property acquired during the year replaces the money or other property exchanged therefor. This being the case, petitioners' nontaxable receipts were included in net income as computed by the Tax Court. These items were as follows:

| | |
|---|---|
| 1. Nontaxable army pay | $1,500.00 |
| 2. Rental allowance | 1,440.00 |
| 3. Subsistence allowance | 504.00 |
| 4. Damages for lost uniforms | 200.00 |
| Total | $3,644.00 |

Item 1 is exempt from income tax under Sec. 22 (b) (13) (A), Internal Revenue Code.

Item 2 does not represent taxable income according to Sec. 29.22 (a) -3, Regulations 111.

Item 3 does not represent taxable income according to Min. 3413, CB June 1926, page 29.

Item 4 represents a return of capital under any theory of accounting.

Neither the Tax Court nor the Fifth Circuit gave any reason for not excluding these items from taxable income. It is true that the Tax Court did not add petitioners' nondeductible expenses to their increase in net worth, but error on the part of the Tax Court does not make it proper to tax receipts that are non-taxable by law or represent a return of capital.

It is respectfully submitted that both the Tax Court

and the Fifth Circuit erred in refusing to exclude the above enumerated items from taxable income.

## IV.

*The Circuit Court of Appeals erred in refusing to remand to the Tax Court for correction of an admitted mistake in the computation of taxable net income.* (Pertinent to Assignment 4 and Fourth Question.)

Respondent admitted in the Circuit Court of Appeals, both in his brief and in oral argument, that the Tax Court had made a mistake of $1,000 in computing petitioners' taxable net income. The Circuit Court of Appeals originally affirmed the decision of the Tax Court without making any reference to said mistake. Upon motion to modify its decision, the Circuit Court of Appeals modified by providing that the Tax Court could make any corrections under Rule 50, in its computation of petitioners' tax liability warranted or justified by the record.

Since Rule 50 of the Tax Court's rules of practice relates to the proper computation of the tax only, based on the findings of fact, the Tax Court is without authority to correct an error of fact under Rule 50. The error of fact could have been corrected upon motion prior to perfecting the appeal to the Fifth Circuit, but this error was not discovered by counsel until after the appeal had been perfected. Under the circumstances, and in view of the fact that the Tax Court failed to give petitioners credit for $1,859.64 additional taxes paid with an amended return, (R. 109), the petitioners simply can not understand the reluctance of the Fifth Circuit to remand this cause for the correction of admitted mistakes.

It is respectfully submitted that this Court should remand this cause to the Tax Court for the correction of admitted errors, if for no other reason.

## CONCLUSION

It is respectfully submitted that the writ should be granted.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1950

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No. 294

JOSEPH AND BULA R. CARMACK, PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 15-25) are not officially reported. The opinion of the Court of Appeals (R. 102-105) is reported at 183 F. 2d 1.

### JURISDICTION

The judgment of the Court of Appeals was entered June 30, 1950. (R. 105.) A motion to modify the decision was filed July 14, 1950. (R. 105-108.) On August 1, 1950, the Court of Appeals entered an

order modifying its original decision by providing that the affirmance was without prejudice to the right of the Tax Court under Rule 50 to make any corrections in its computation of taxpayer's [1] tax liability warranted or justified by the record, and otherwise affirming its original judgment. (R. 109.) The petition for a writ of certiorari was filed September 7, 1950. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

### QUESTIONS PRESENTED

1. Whether the Tax Court was required to believe the testimony of the taxpayer and his wife, despite its conclusion that such testimony was inherently improbable.

2. Whether the Tax Court correctly applied the "increase in net worth" method of computing taxpayer's unreported income.

3. Whether the Court of Appeals made proper provision for the correction of mathematical errors committed by the Tax Court.

### STATUTE, REGULATIONS AND RULES INVOLVED

These appear in the Appendix, *infra.*

### STATEMENT

Taxpayer and his wife filed a joint income tax return for 1945 in which they reported a gross income of only $4,144.96. This amount constituted the taxpayer's compensation for services as a Colonel in the United States Army. (R. 15.)

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[1] Joseph Carmack is referred to as the taxpayer in this case.

Taxpayer had no income apart from his salary, poker winnings and bond interest. The bond interest in 1945 was $49.74. (R. 20.)

In June of 1947, the 1945 return of taxpayer and his wife was assigned to a revenue agent for investigation, after the Intelligence Unit of the Treasury had reported remittances of $2,000 in July and $14,500 in October by taxpayer to his wife. (R. 19-20.) Taxpayer admitted having won a sizable sum from gambling at poker, but claimed he did not know this amount constituted taxable income. On October 8, 1947, he filed an amended joint return for 1945, in which he added the amount of $6,500 as "Estimated poker winnings above losses" to his salary as an Army officer which he had originally reported. This amended return was not accepted by the Collector. (R. 20.) After an investigation the Commissioner determined that taxpayer had understated his gross income for 1945 in the amount of $41,244.58, and that his total gross income for that year was $45,389.54. (R. 9, 19-20.)

Taxpayer joined the Army as a private in 1923; became a Second Lieutenant in the Reserve Corps in 1927 and in the regular Army in 1930. (R. 16.) He thereafter was promoted regularly until he attained the rank of Colonel in 1945. (R. 16-17.)

At the time of her marriage taxpayer's wife had several hundred dollars in a Manila bank account,

and thereafter taxpayer sometimes gave her money which he had won at poker playing in addition to a $100 monthly allowance. Taxpayer purchased a home in San Antonio in 1939 for $6,100, giving a note for most of the price, which note was payable in monthly installments of $40. He also opened an account with the Fort Sam Houston National Bank of San Antonio in the joint names of himself and his wife. (R. 16.)

In 1940 for the first time taxpayer allotted a portion of his salary for direct payment to his wife. In 1942 he was ordered to Battle Creek, Michigan, where he served a year as officer in charge of Army hospital supplies. He opened there a joint account with the Michigan National Bank. In July 1943 he was sent to the Mediterranean theater of operations, serving in Algiers and Italy as administrative officer with the Medical Department. He returned to the United States in November 1945. In 1944 taxpayer's wife paid off the $5,400 still due on the home mortgage note. (R. 16-17.)

On January 1, 1945, taxpayer and his wife held War Bonds of a maturity value of $6,950, which had cost $5,212.50. Of this holding, six $1,000 bonds costing $4,500 had been bought in 1944, while taxpayer was overseas. The credit balances in their joint accounts with the Fort Sam Houston and Michigan National Banks were $447.88 and $896.34, respectively. Between April and December 1945, 19 $1,000 War Bonds were issued to

taxpayer or wife, at a total cost of $14,250. They also invested $7,500 in Postal Savings Bonds during 1945. (R. 17-18.)

In September and in October 1945, taxpayer's wife sent him two $5,000 cashier's checks for which she paid by cashing War Bonds and Postal Savings, making a withdrawal from one of their banks and using an additional $500. Taxpayer wished the money to use for poker stakes. The two $5,000 cashier's checks, which were not negotiable, were presented for payment at Vatican City on February 7, 1946. (R. 18.)

In October taxpayer transmitted to his wife a money order for $14,500. On November 11, prior to leaving for the United States, taxpayer procured from the Army Finance Officer for cash a money order for $10,000 which he cashed in Newport News, Virginia, and on December 31 taxpayer purchased three $5,000 cashier's checks. (R. 18.)

During 1945 an aggregate of $15,075.85 was deposited in the joint account with the Fort Sam Houston Bank and $8,407.12 was withdrawn, leaving a credit balance of $7,116.61, or $6,668.81 in excess of the balance on January 1. During 1945 an aggregate of $8,300 was deposited in the joint account with the Michigan National Bank and $7,097.94 was withdrawn, leaving a credit balance of $2,098.40, or $1,202.06 in excess of the balance on January 1. (R. 18-19.)

In summary taxpayer and his wife held the following amounts in bank accounts, Series E War

Bonds, Postal Savings Bonds, and cashier's checks at the beginning and at the end of 1945:

| | Bank Accts. | Series E Bonds | Postal Savings | Cashier's Checks | Total |
|---|---|---|---|---|---|
| Jan. 1 | $1,344.22 | $ 5,212.50 | ..... | ..... | $ 6,556.72 |
| Dec. 31 | 9,215.01 | 13,087.50 | $5,000 | $15,000 | 42,302.51 |
| Increase | $7,870.79 | $ 7,875.00 | $5,000 | $15,000 | $35,745.79 |

After taxpayer's return from Italy he and his wife began negotiations for the purchase of an apartment house, which she bought for $30,000, taking title to it as her separate property. Later in 1946 taxpayer bought a hotel for $50,000, borrowing $20,000 by mortgage on the apartment house and $25,000 from a Colonel with whom he had been associated in poker games and had some accounts to settle. (R. 19.)

The Tax Court sustained the Commissioner's finding that taxpayer had understated his income, but reduced the Commissioner's computation of his gross income for 1945 to $37,465.49. (R. 25, 103.) [2]

ARGUMENT

The decision of the Court of Appeals affirming the Tax Court's determination of purely factual issues is patently correct and involves no conflict with any decision. This being so, and since the petition raises no substantial question of law, it should be denied.

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[2] The figure of $38,465.49 given in the Tax Court's opinion is erroneous; the Court of Appeals stated the amount correctly in its opinion. (R. 103.) See also p. 11, *infra*.

1. There is no merit in taxpayer's contention that the Tax Court erred in rejecting uncontradicted testimony of taxpayer and his wife. Ordinarily where an unimpeached witness testifies positively to a fact, and is not contradicted, the fact so testified to may be taken as established; but that rule is subject to many exceptions, among which is that no court is compelled to accept inherently improbable testimony. See *Quock Ting* v. *United States,* 140 U. S. 417, 420, 421; *Helvering* v. *Nat. Grocery Co.,* 304 U. S. 282, 295; *Rosenberg* v *Baum,* 153 F. 2d 10, 13-14 (C. A. 10th); *Cohen* v. *Commissioner,* 148 F. 2d 336, 337 (C. A. 2d); *Birnbaum* v. *Commissioner,* 117 F. 2d 395, 396 (C. A. 7th); *Uhl Estate Co.* v. *Commissioner,* 116 F. 2d 403, 405 (C. A. 9th); *Hoefle* v. *Commissioner,* 114 F. 2d 713 (C. A. 6th); *O'Laughlin* v. *Helvering,* 81 F. 2d 269, 271 (C. A. D. C.); *Rand* v. *Helvering,* 77 F. 2d 450, 451 (C. A. 8th); *Greenfeld* v. *Commissioner,* 165 F. 2d 318, 319 (C. A. 4th).

The testimony in question related to the enormous increase in taxpayer's holdings between January 1, and December 31, 1945. (R. 19.) The explanation offered by taxpayer and his wife of the major part of this increase was that on January 1, 1945, the wife had in her possession $25,000 in bills from which they drew;[3] that this and other

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[3] A further explanation offered by taxpayer as to his net worth increase was that a part of his holdings reflected payment of debts due to him. As to this contention the Tax Court held (R. 24) that it was unable to accept taxpayer's

large sums of money were for 11 years kept in a cedar chest in their house (R. 22-23, 40), and prior to his transfer to Italy, were carried by taxpayer and his wife to his various posts of duty (R. 40), which included Denver, Colorado, Carlisle, Pennsylvania, Honolulu, T. H., and San Antonio, Texas. The Tax Court was clearly justified in disregarding such a story as inherently improbable.[4] As the Tax Court noted (R. 23):

> * * * here the circumstances tend to refute rather than corroborate the alleged cash ac-

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testimony which contained obvious inaccuracies. For example, taxpayer testified that he made a loan of $2,000 to a Colonel Meisch in 1942, which loan was not repaid until 1945. (R. 65.) Yet taxpayer testified that one year later, in 1946, he borrowed $25,000 from this same man who had allegedly taken three years to repay taxpayer's loan to him of $2,000, and who was a salaried man with no great fluctuation of income, so far as the record shows. Moreover, taxpayer stated that a $1,500 deposit slip of November 27, 1945, not put in evidence, reflected repayments of loans he had made to various officers; but he then acknowledged that six $50 checks covered by the slip had been returned unhonored and that $1,000 of the deposit was a Treasury check with which a Colonel "could very easily" have paid him. "I don't recall exactly how he paid me." (R. 24, 66, 70-72.)

[4] A few examples of the implausibility of and conflict in the testimony of taxpayer and his wife are as follows:

Taxpayer claimed that from his Army salary and poker winnings he made his wife presents which totalled over $30,000 by 1943 (R. 22, 46), yet he testified that he "broke about even" in his poker playing during the period 1931 to 1944 (R. 23, 42, 72), and prior to 1940 he reported little or no taxable income (R. 15). The alleged gifts which he made to his wife ranged from $1,900 in 1943 (R. 33) (37 percent of his base pay of $5,197 as Lieutenant Colonel (R. 51)), to $1,200 in 1932 (R. 33) (80 percent of his base pay of $1,500 as Second Lieutenant (R. 50)). Although he claimed that prior to 1945 his wife kept a small fortune at home in a box, he maintained several bank accounts. (R. 38, 44.) Although his increase in net worth was attributed to cash kept at

> cumulation. * * * Neither petitioner's position nor the pattern which emerges from his established financial transactions are at all compatible with the domestic hoarding of thousands of dollars. * * *

In other words, here, as in *Quock Ting* v. *United States,* 140 U. S. 417, 420-421, taxpayer is "* * * contradicted by the facts he states as completely as by direct adverse testimony." Under such circumstances the Tax Court was clearly at liberty to reject the testimony of this interested witness and his wife, and to hold that "whether * * * [the] amount [of increase in net worth] was derived from poker winnings or other sources, peti-

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home, no recipient testified that any large payment was made in bills. (R. 23.) On the contrary the record shows the transaction of taxpayer's business largely by check. (R. 23.) Likewise, cash not immediately needed by taxpayer or his wife (other than the amount supposedly kept by them at home) was deposited in the bank. (R. 92-97.) When taxpayer purchased a home for $6,100 in 1939, he gave a mortgage note for $5,400 of the purchase price (R. 23, 33, 38-39), although his wife testified that the cash balance supposedly kept at home was at that time $24,000 (R. 41-42). Whereas in all the years prior to 1945 taxpayer's heaviest investment was the purchase of a $6,100 home, immediately upon his return from Italy, he and his wife made substantial investments in real estate, buying an apartment house and a hotel within a year. (R. 34-35, 38, 46-47). In this connection, taxpayer's statement (Br. 19) that his wife purchased the apartment house out of her separate funds is refuted by his testimony (R. 66) that "I borrowed $20,000 on the apartment house * * *." When taxpayer's wife was asked where the money box was kept she did not answer, saying that she had her "own personal reason for not stating." (R. 40.) Finally, although taxpayer testified generally that his evidence was based on vouchers, records and other documents, he introduced none of them in evidence in corroboration of his testimony.

tioner has not overcome the determination that it was taxable income in 1945 * * *." (R. 25.) [5]

2. Nor is there any merit in the contention (Br. 21) that the Tax Court erred in computing taxpayer's net worth. Increase in net worth means the increase in assets held. Here taxpayer held some $35,000 more in assets at the end of the taxable year than he had held at its beginning (R. 19), and under the Tax Court's findings of fact it is patent that a large part of this increase was due to unreported income. In cases of this nature where large understatements of income are involved and inadequate records furnished, it is impossible to arrive at an absolutely accurate determination, and the Tax Court can only approximate the amount of understated income. See *Harris* v. *Commissioner,* 174 F. 2d 70, 73 (C. A. 4th); *Halle* v. *Commissioner,* 175 F. 2d 500, 503 (C. A. 2d). Cf. *Hague Estate* v. *Commissioner,* 132 F. 2d 775, 777 (C. A. 2d); *Hoefle* v. *Commissioner,* 114 F. 2d 713 (C. A. 6th); *Kenney* v. *Commissioner,* 111 F. 2d 374 (C. A. 5th); *O'Dwyer* v. *Commissioner,* 110 F. 2d 925 (C. A. 5th); *Bishoff*

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[5] Indeed, taxpayer himself recognizes the applicable rule of law when he says (Br. 17):

> *Unless the testimony of the witnesses was highly improbable or manifestly unreasonable,* the Tax Court erred in rejecting same. *Crude Oil Corp.* v. *Commissioner,* 161 F. (2d) 809; *Foran* v. *Commissioner,* 165 F. (2d) 705; *Grace Bros.* v. *Commissioner,* 173 F. (2d) 170; *Howell Turpentine Co.* v. *Commissioner,* 162 F. (2d) 319; *Mayson Mfg. Co.* v. *Commissioner,* 178 F. (2d) 115. [Italics supplied.]

v. *Commissioner,* 27 F. 2d 91 (C. A. 3d). Here the Tax Court would have been justified in holding that taxpayer spent his entire salary on living expenses and that his entire increase in net worth was attributable to unreported income. However, it reduced taxpayer's increase in net worth by an amount which it considered was attributable to salary, and further reduced the Commissioner's determination by accepting taxpayer's statement as to the balance in the Michigan National Bank which was less than the balance shown by the Commissioner. (R. 24-25.)

3. The Court of Appeals properly provided for the correction of the admitted mathematical errors referred to by taxpayer (Br. 23) by the modification of its judgment so as to permit the rectification of the errors pursuant to Rule 50 of the Tax Court. The Commissioner is in agreement that these errors should be corrected and this agreement can be effectuated in the computation pursuant to the provisions of Rule 50 of the Tax Court and Rule 60(a), Federal Rules of Civil Procedure (See Appendix, *infra*).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1950.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

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(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

(a) *Negligence.*—If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency, except that the provisions of section 272(i), relating to the prorating of a deficiency, and of section 292, relating to in-

terest on deficiencies, shall not be applicable. * * *

(26 U.S.C. 1946 ed., Sec. 293.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

> SEC. 29.22(a)-1. *What Included in Gross Income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections 22(b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. * * * Income may be in the form of cash or of property.

Rules of Practice before the Tax Court of the United States (revised to December 15, 1948):

> RULE 50.—COMPUTATIONS BY PARTIES FOR ENTRY OF DECISION.
>
> Where the Court has promulgated or entered its opinion determining the issues in a proceeding, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the Court's determination of the issues, showing the correct amount of the deficiency or overpayment to be entered as the decision. If the parties are in agreement as to the amount of the deficiency

or overpayment to be entered as the decision pursuant to the report of the Court, they or either of them shall file promptly with the Court an original and two copies of a computation showing the amount of the deficiency or overpayment and that there is no disagreement that the figures shown are in accordance with the report of the Court. The Court will then enter its decision. If, however, the parties are not in agreement as to the amount of the deficiency or overpayment to be entered as the decision, in accordance with the report of the Court, either of them may file with the Court a computation of the deficiency or overpayment believed by him to be in accordance with the report of the Court. The Clerk will serve a copy thereof upon the opposite party, will place the matter upon a motion calendar for argument in due course, and will serve notice of the argument upon both parties. If the opposite party fails to file objection, accompanied by an alternative computation, at least five days prior to the date of such argument, or any continuance thereof, the Court may enter decision in accordance with the computation already submitted. If in accordance with this Rule computations are submitted by the parties which differ as to the amount to be entered as the decision of the Court, the parties will be afforded an opportunity to be heard in argument thereon on the date fixed, and the Court will determine the correct deficiency or overpayment and enter its decision.

Any argument under this Rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the report already made, and no argument will be heard upon or consideration given to the issues or matters already disposed of by such report or of any new issues. This Rule is not to be regarded as affording an opportunity for rehearing or reconsideration.

Federal Rules of Civil Procedure, as amended:

RULE 60. RELIEF FROM JUDGMENT OR ORDER.

(a) *Clerical Mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

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